IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0522

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROLAND DEE TIREY,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court, Flathead County,
The Honorable Katherine R. Curtis, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
SHERI K. SPRIGG
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ED CORRIGAN
Flathead County Attorney
Justice Center
P.O. Box 1516
Kalispell, MT 59903-1516

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

JOSLYN HUNT
Chief Appellate Defender
EILEEN A LARKIN
Assistant Appellate Defender
139 North Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEYS FOR DEFENDANT
AND APPELLANT

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STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion by revoking the Defendant/Appellant's probation?

2. Did the district court exceed its statutory authority when it added new conditions of probation upon revocation of the Defendant/Appellant's original suspended sentence?

3. Did the district court err when it changed the Defendant/Appellant's designation level as a sex offender without obtaining a current sex offender evaluation?

4. Did the district court provide sufficient reasons for its determination that no credit be given for time elapsed while on probation?

STATEMENT OF THE CASE

Defendant/Appellant Roland Dee Tirey (Tirey) pled guilty to felony sexual assault on September 19, 1996. (Appellant's App. A at 1.) He was sentenced to 50 years in Montana State Prison, with 25 years suspended. (Appellant's App. A at 3.)

Tirey was paroled on June 24, 2004. (D.C. Doc. 98.) His parole was subsequently revoked on November 8, 2005, and he returned to prison to complete

the unsuspended portion of his sentence. (D.C. Doc. 100, attached Report of Violation at 1; D.C. Doc. 120, State's Ex. 2-3.)

Tirey was again released from prison, this time to serve the suspended portion of his sentence, on November 10, 2008. (D.C. Doc. 100, attached Report of Violation at 1.) Tirey's probation officer filed a Report of Violation on December 10, 2008 (D.C. Doc. 100), and the county attorney filed a Petition for Revocation of Suspended Sentence the next day. (D.C. Doc. 101.) After a contested hearing, Tirey's suspended sentence was revoked on March 19, 2009. (Appellant's App. C at 2.)

Upon revocation, Tirey was sentenced to 25 years at Montana State Prison, with 7 years suspended. (Appellant's App. C at 3.) He was given credit for time served in detention, but not for time served on probation. (Appellant's App. C at 6.) The district court designated Tirey a Level II Sex Offender, and ordered Tirey to comply with a number of conditions in addition to those in his original judgment. (Appellant's App. C at 3-6.)

Tirey appeals the revocation of his suspended sentence and certain aspects of his new sentence. (D.C. Doc. 131.)

STATEMENT OF FACTS

I. ORIGINAL OFFENSE

Tirey sexually assaulted his ten-year-old stepdaughter on multiple occasions. (Appellant's App. A at 1.) Tirey had been married to the victim's mother less than two months, having first met her by phone from Ohio only a month before their marriage. (Id.)

II. PROBATION VIOLATIONS

Tirey's probation officer testified that from the beginning of her supervision of Tirey, he was at a high level of supervision because of certain risk factors, including the nature of his offense, his lack of stability in the community in terms of employment and housing, the fact that he was not actively involved in treatment, and his prior adjustment to supervision. (3/19/09 Tr. at 10-11.) She explained how that increased risk affected her approach toward violations:

> [A]ny miss when I don't know where any of my offenders are in the community is a concern. . . . [T]hose (inaudible)--with the highest risk, sexual offenders. Those that had child victims, those that have multiple offenses, the Tier III's. . . . [A]nytime I have somebody who's non-compliant as far as reporting especially when they knew that they were in trouble for non-compliance, it's always a concern whether they're gonna (sic) run, whether they're gonna (sic) do something, um, inappropriate in the community. Those things I can only address if I know where he's at . . . .

(3/19/09 Tr. at 11-12.)

With those concepts in mind, the probation officer informed Tirey when she first met with him on November 12, 2008 that "he needed to be in treatment. I gave him two weeks to get into treatment." (3/19/09 Tr. at 7-8, 57.) Furthermore, "[h]e needed to get a job as soon as possible." (3/19/09 Tr. at 8.)

The probation officer gave Tirey referral information for Lindsay Clodfelter, an MSOTA (Montana Sex Offender Treatment Association) certified sex offender specialist. (3/19/09 Tr. at 8.) The probation officer also contacted Clodfelter "to ensure that [Tirey] would be able to comply with the requirement to get in within two weeks. She said she was willing to take him into treatment, um, he just needed to do his part which was get a hold of her and start attending." (3/19/09 Tr. at 12 (emphasis added).) The probation officer did not place any other requirements on Tirey with respect to a job search at that initial visit. (3/19/09 Tr. at 8-10.)

A week later, Tirey reported for his weekly meeting with the probation officer at 11 a.m., but she was out of the office because the meeting was scheduled for 3 p.m. (Def's Ex. B at 11/20/08.) He apparently called the next day (November 20, 2008), and reported that he was still unemployed and had not made contact with Clodfelter. (Def's Ex. B. at 11/20/08.) The probation officer reiterated that "he has two weeks to be in treatment." (Id.) She also told him that he "would need to go on formal job search on Tuesday if he is not employed." (Id.)

The following day, November 21, Clodfelter informed the probation officer that Tirey had not shown up for a scheduled appointment on November 20 or for the group meeting as directed. (3/19/09 Tr. at 58; Def's Ex. B at 11/21/08.) She told the probation officer that Tirey was to report to her on Tuesday (November 25) at 2:30 p.m. at her office. (3/19/09 Tr. at 58-59; Def's Ex. B at 11/21/08.) The probation officer followed up with Tirey, telling him that he needed to be at that appointment on November 25. (3/19/09 Tr. at 60.)

On Wednesday, November 26, 2008, two weeks after Tirey's supervision started, he reported to his probation officer and told her that he did not go for sex offender treatment the day before as scheduled. (3/19/09 Tr. at 13; Def's Ex. B at 11/26/08.) Rather, he said that he was going to have an appointment the following day (Thanksgiving). (Id.) The probation officer testified to her growing concern:

> . . . I knew he hadn't been being honest with me. Um, he's reporting that he's having contact with Lindsay [Clodfelter], that she's saying he needs to be in her office at--on this date. That lack of accountability--um, I needed to find out whether or not he was still appropriate for community safety issues, so I placed him in custody so I could do further investigation.

(3/19/09 Tr. at 13.)

Tirey was placed in a 72-hour hold under Mont. Code Ann. § 46-23-1012(3). (3/19/09 Tr. at 14.) During that time, the probation officer spoke again with Clodfelter "to determine whether or not she would continue him in treatment." (3/19/09 Tr. at 14.) The probation officer "looked at some other avenues that I

have for potentially--either increasing his supervision or providing him with more tools which would ensure a greater community safety and to make sure that he was still monitorable in the community." (3/19/09 Tr. at 14.) Finally, the probation officer told Tirey "that he had to go to treatment, the treatment was available," and explained the consequences of failing to attend treatment. (3/19/09 Tr. at 14.)

Before placing Tirey in custody, the probation officer also placed him on "what we classify as job search." (3/19/09 Tr. at 8.) The probation officer explained: "He's provided a job log and he is to do 20 contacts with employers a day. . . . I pretty much outline that they need to be working as hard to find a job as if they were working eight hours a day. . . . He was to turn them in daily." (3/19/09 Tr. at 8-9.) "[T]he job search logs help them organize their job searches, it also . . . helps them track and myself track where they're at in the community, what they're doing and making sure that they're complying with that requirement to seek employment actively." (3/19/09 Tr. at 10.)

Tirey was released from custody on Saturday, November 29, and told to report to his probation officer as soon as possible. (3/19/09 Tr. at 30, 32.) Tirey did not report to his probation officer until Tuesday, December 2, when he asked her to approve housing for him on Upper Woodchuck Road. (Def's Ex. B, C.) He had not been filling out the job logs. (3/19/09 Tr. at 28-29; 42-43.) He informed the probation officer that he had an appointment with Clodfelter that day. (Def's

Ex. B at 12/2/09.) However, he did not attend that appointment. (3/19/09 Tr. at 14; State's Ex. 1.) Clodfelter then classified Tirey as non-compliant with the sex offender treatment program. (3/19/09 Tr. at 15.)

The next day, December 3, Tirey was supposed to have his regular weekly meeting with his probation officer at 7:30 a.m. (3/19/09 Tr. at 16.) He did not show up then or later in the day, but rather left a voice message to say that he had run out of gas at a location considerably distant from the Upper Woodchuck location where the probation officer thought he was staying. (3/19/09 Tr. at 16, 22, 43-46; Def's Ex. B at 12/3/09.) The probation officer started looking for Tirey. (3/19/09 Tr. at 16.) Tirey had called Clodfelter that morning and told her "I need to be here [at Clodfelter's office], if I'm not here I'm going to be thrown in jail." (3/19/09 Tr. at 16-17, 31.) Clodfelter had scheduled an appointment for him around noon that day. (3/19/09 Tr. at 17, 35.)

Tirey was arrested for violation of probation at Clodfelter's office when he appeared for the noon appointment. (3/19/09 Tr. at 16-17.) This revocation proceeding followed.

The district court found the facts to be as follows:

> Based upon the testimony the Court finds by a preponderance of the evidence that the Defendant violated the conditions of his probation in that he failed to turn in on a daily basis the job logs as testified to actually by both of the witnesses, therefore he violated Special Court Condition #1-C.

> He also failed to report to his probation officer as directed, specifically on December 3rd, Special Court Condition #1-E.
>
> He failed to comply with all recommendations for outpatient sex offender treatment, specifically in that he had not enrolled in sex offender treatment within the two weeks from November 12th as directed by his probation officer and missed appointments with the treatment provider at least on November 25th and December 2nd.

(3/19/09 Tr. at 73.)

III. DISPOSITION

At the dispositional hearing, the county attorney presented evidence that further explained the probation officer's concern about maintaining strict accountability for Tirey's whereabouts and behavior while in the community, namely, his prior history while on parole in 2004 and 2005.

Tirey's parole had been revoked on three grounds. (5/12/09 Tr. at 25; State's Ex. 2 (D.C. Doc. 120).) The first ground was that he had lied to his parole officer by telling her he had been involved in a charitable program for children, in order to improve his reputation. (5/12/09 Tr. at 25, 28.) He told the same lie to Clodfelter, who was his sex offender treatment provider at the time. (5/12/09 Tr. at 18.) The second ground was that he had failed to report to his parole officer as required. (5/12/09 Tr. at 28-29.)

The final ground on which his parole had been revoked was that Tirey had accessed a website called singleparents.com and used that site to establish romantic

relationships with single mothers. (5/12/09 Tr. at 29.) This behavior was "eerily similar" to his behavior during the original offense for which he was convicted. (5/12/09 Tr. at 31.) As Clodfelter testified, this behavior "could be a grooming behavior" and was of concern to her, especially since it occurred after Tirey had completed both phases of sex offender treatment in prison. (5/12/09 Tr. at 22.)

Based on this history and Tirey's behavior while on probation this time, his probation officer recommended that he return to prison, explaining:

> His behaviors on community supervision, um, can only be seen as a--a risk to the community. He's actively sought out women with children while on parole, this is his second attempt at community supervision, trying to keep track of him was very, very difficult, he was never where he was supposed to be. He didn't report. He wouldn't go to treatment. All the behaviors that reduce the risk of re-offense he was not complying with. Um, from the time he was out, um, I do know he was in Mineral County, he was in Ravalli County, he was in Missoula County, yet he offers up the reason he can't report is 'cause he doesn't have enough gas. Um, he appeared to have the ability to do whatever he wanted to but not necessarily what he should have been doing.

(5/12/09 Tr. at 32.)

Tirey took the stand at his dispositional hearing and offered a number of excuses for his violations, as he had at the revocation hearing, and continues to do on appeal. (See 5/12/09 Tr. at 49-61; 3/19/09 Tr. at 31-56; Appellant's Br. at 1-9.) Clodfelter, his sex offender treatment provider, testified that she would be "willing to take him back" into group therapy, but made no "recommendation" concerning

the advisability of community treatment as opposed to imprisonment. (5/12/09 Tr. at 10-11, 21.)

After hearing the evidence, the district court stated:

> The Court is not concerned about Mr. Tirey either not getting a job or not having 20 employment-related contacts per year--or per day.
>
> The Court is significantly concerned about Mr. Tirey's--significantly concerned about Mr. Tirey's failure to get into treatment, even more concerned by Mr. Tirey's failure to accept responsibility for that and failure to offer any credible--at least as far as the Court analyzes, any credible excuse for--for not doing so.
>
> I don't . . . find much of what you said, Mr. Tirey, to be credible and as [the county attorney] points out, that's been an issue from the very beginning with regard to your case with regard to those who have in an expert capacity assessed your risk to re-offend and made recommendations to the Court for sentencing.

(5/12/09 Tr. at 70.) These concerns were reiterated in the district court's written judgment, which stated:

> In fashioning the following sentence, the Court has considered the nature of the violations of probation conditions, particularly his failure to participate in sex offender treatment as recommended. The Defendant fails to take responsibility for not attending treatment as directed and offers incredible excuses for when he does miss treatment appointments.

(Appellant's App. C at 2-3.)

The district court sentenced Tirey to 25 years at Montana State Prison, with 7 years suspended. (5/12/09 Tr. at 71; Appellant's App. C at 3.) Additional facts concerning Tirey's sentence will be included in the Argument below.

STANDARDS OF REVIEW

This Court reviews a district court's decision to revoke a suspended sentence to determine whether the court's decision was supported by a preponderance of the evidence in favor of the State and, if so, whether the court abused its discretion. State v. Belanger, 2008 MT 383, ¶ 9, 347 Mont. 61, 196 P.3d 1248 (citations omitted). A district court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. Id.

This Court conducts a de novo review on the question whether a sentence imposed upon revocation is within statutory parameters. State v. Seals, 2007 MT 71, ¶ 7, 336 Mont. 416, 156 P.3d 15 (citations omitted).

The decision whether to allow or reject credit for time elapsed while on probation lies fully within the discretion of the sentencing judge. Mont. Code Ann. § 46-18-203(7)(b). It should be reviewed for an abuse of discretion. State v. Sheehan, 2005 MT 305, ¶ 18, 329 Mont. 417, 124 P.3d 1119.

SUMMARY OF ARGUMENT

1. Tirey's revocation should be affirmed. The State showed by a preponderance of the evidence that Tirey had failed to meet at all with his sex offender treatment provider during the first three weeks of his probation, despite

the constant admonishments of his probation officer to do so. The district court found Tirey's excuses incredible and his lack of accountability disturbing, and acted within its discretion in revoking his probation. The court had no duty to consider alternatives to incarceration, since Tirey's violations were in no way due to the actions of the State. His homelessness and incredible argument that he was not actually required to "attend" sex offender treatment, just "enroll," were not raised below as reasons for his violations and cannot excuse his failures.

2. The new conditions of probation added to Tirey's suspended sentence should be affirmed. The legislature has made clear that the 2007 revocation statute, which allows a district court to impose upon revocation "any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence," applies to Tirey. Mont. Code Ann. § 46-18-203(9). All of the new conditions imposed by the district court are conditions for rehabilitation and protection of the public that "could have been imposed" in 1996, when Tirey committed his crime, and none of them increase the length of his sentence. Therefore, they are authorized under the 2007 revocation statute.

Tirey waived any ex post facto challenge to the 2007 statue as applied to his conditions of probation by failing to raise it below. In any event, it is without merit. Revocation statutes may, if the legislature so indicates, operate retroactively

to offenders who committed their crimes before the statutes were adopted. The ex post facto inquiry in such cases is whether the statute, as applied, is "punitive" or results in "increased punishment." Conditions of probation such as the new conditions imposed on Tirey, which are designed to aid in rehabilitation and the protection of the public, are not punitive and do not violate ex post facto prohibitions.

Even if the 1995 revocation statute were applied to Tirey, the new conditions would be authorized. That statute authorizes the district court to require the defendant to serve "either the sentence imposed or any lesser sentence." Mont. Code Ann. § 46-18-203(7)(c) (1995). A sentence of 25 years, with 7 suspended on conditions relating to the rehabilitation of the offender or the protection of the public, is a "lesser sentence" than the "sentence imposed" of 25 years in prison. To the extent that State v. White, 2008 MT 464, ¶¶ 23-24, 348 Mont. 196, 199 P.3d 274, and State v. Rudolph, 2005 MT 41, ¶ 17, 326 Mont. 132, 107 P.3d 496 hold otherwise, they should be overruled.

3. The State concedes, under the circumstances of this case, that the district court erred in redesignating Tirey from a Level One sex offender to a Level Two sex offender without ordering a current evaluation report by a qualified sex offender evaluator as required by Mont. Code Ann. § 46-23-509(2).

4. The district court provided sufficient reasons for denying credit for street time, including Tirey's failure to attend sex offender treatment, failure to take responsibility for his actions, and his "incredible excuses" for his failures.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REVOKING TIREY'S SUSPENDED SENTENCE.

A. The State Established by a Preponderance of the Evidence That Tirey Had Violated Conditions of His Probation.

The State established by a preponderance of the evidence that Tirey had not started treatment within two weeks of being placed on probation, having missed appointments with his sex offender treatment provider on November 25 (just before the two weeks was up) and December 2 (which was already nearly three weeks into his probation). (See, e.g., 3/19/09 Tr. at 13-15; State's Ex. 1.) The State established by a preponderance of the evidence that Tirey failed to report to his probation officer as required on December 3. (See, e.g., 3/19/09 Tr. at 11, 22, 29-30, 34-35.) The State established by a preponderance of the evidence that Tirey failed to maintain and submit job logs as required. (See, e.g., 3/19/09 Tr. at 42-43 (Tirey's own admission that he did not do so).)

Tirey did not claim below, as he does on appeal, that he was only required to speak to a sex offender treatment provider by telephone once within his first two

weeks of probation, and did not have to actually attend any scheduled appointments or treatment sessions. (Appellant's Br. at 19-21.) Appellant's Appendix F was not part of the record below, because the distinction between "enrolling" and "attending" was not at issue.

In any event, the evidence was clear that Tirey was required to actually begin treatment before the two weeks were up, not just "sign up" with a provider. The probation officer testified that from the beginning "he needed to be in treatment. I gave him two weeks to get into treatment." (3/19/09 Tr. at 8.) Her notes support that statement. See Def's Ex. B at 11/12/08 ("given two weeks to get with a therapist as he refused to do it prior to discharge"); 11/20/08 ("was again told he has two weeks to be in treatment"). Tirey himself testified that he had "orders to, um, be at group in--in two weeks." (3/19/09 Tr. at 36 (emphasis added).) The evidence was undisputed that Tirey never went to his therapist's office at all during the first three weeks of his probation. Although Tirey claimed at sentencing that he did not know his therapist's address, and only found it by wandering around downtown Missoula (5/12/09 Tr. at 61), he had on him when he was arrested the correct address written on a piece of paper. (5/12/09 Tr. at 63.)

There was sufficient evidence to establish that Tirey violated three conditions of his probation, including the condition that he begin sex offender treatment within two weeks of starting probation.

B. The District Court Did Not Abuse Its Discretion in Deciding to Revoke.

1. Applicable Law

Tirey relies on State v. Lee, 2001 MT 176, ¶ 21, 306 Mont. 173, 31 P.3d 998, for the proposition that a district court must consider adequate alternatives to incarceration before revoking a suspended sentence. (Appellant's Br. at 13-14, 22.) But the holding in Lee was limited to "the present circumstances" of that case. Lee, ¶ 23. Those circumstances were that Lee had failed to complete sex offender treatment while in prison as required, not because of his willful conduct, but because the prison's waiting lists for treatment as well as a sit-down strike at the prison had delayed his treatment to the point that he had not completed it by the time of his release date. Lee, ¶ 5-7, 23.

The requirement for consideration of alternatives to incarceration is clearly limited to circumstances where a probation violation was caused by circumstances beyond the violator's control. In State v. Senn, 2003 MT 52, ¶ 34, 314 Mont. 348, 66 P.3d 288, this Court limited the requirement of Lee to situations where probation conditions "were impossible to meet." Similarly, in State v. Price, 2008 MT 319, ¶¶ 23-24, 346 Mont. 106, 193 P.3d 921, the Court distinguished Lee

on the grounds that "Lee's failure to satisfy the conditions of his suspended sentence was due to the actions of the State . . . ." See also Black v. Romano, 471 U.S. 606, 613 (1985) (cited in State v. Richardson, 2000 MT 72, ¶¶ 12-14, 299 Mont. 102, 997 P.2d 786) ("[I]ncarceration for violation of a probation condition is not constitutionally limited to circumstances where that sanction represents the only means of promoting the State's interest in punishment and deterrence [sic].").

Tirey's attempt to argue that it is all his probation officer's fault that he failed to maintain and turn in the job logs, to attend at least two scheduled treatment appointments on November 25 and December 2, or to report to his probation officer on December 3, must fail. The excuses he gave at his revocation hearing were rejected by the district court as incredible. As with any evidentiary issue, the district court had the responsibility of weighing all of the evidence presented and determining the credibility of the witnesses in light of all of the testimony. State v. Weaver, 2008 MT 86, ¶ 24, 342 Mont. 196, 179 P.3d 534. The district court's finding that Tirey's excuses were not credible is supported by the evidence and is not clearly erroneous.

Under the circumstances of Tirey's case, where the district court found that Tirey's conditions were possible for him to meet, but he simply failed to meet them, the court had no obligation to consider alternatives to incarceration before

deciding to revoke. This Court has stated clearly that "[t]here are no minor violations" and "[a] single violation of the conditions of a suspended sentence is sufficient to support a district court's revocation of that sentence." State v. Belanger, 2008 MT 383, ¶ 11, 347 Mont. 61, 196 P.3d 1248 (quoting State v. Gillingham, 2008 MT 38, ¶ 28, 341 Mont. 325, 176 P.3d 1075 and State v. Baird, 2006 MT 266, ¶ 17, 334 Mont. 185, 145 P.3d 995).

The correct inquiry for the district court was not whether there were alternatives to Tirey's incarceration, but "whether the judge is reasonably satisfied that the conduct of the probationer has not been what he agreed it would be if he were given liberty." Belanger, ¶ 9; see also Richardson, ¶ 10.

2. Tirey's Conduct Was Not What He Agreed It Would Be If Given Liberty.

In this case, the district court clearly was satisfied that Tirey's conduct had not been what he agreed it would be if given liberty, in that, within the first three weeks of probation, "he failed to turn in on a daily basis the job logs," he "failed to report to his probation officer as directed," and, most importantly, he "failed to comply with all recommendations for outpatient sex offender treatment." (3/19/09 Tr. at 73.) At the revocation hearing, Tirey indicated his understanding that he "would have to absolutely make every appointment" with his sex offender treatment provider if he were given his liberty. (3/19/09 Tr. at 41.) The district court did not act arbitrarily or unreasonably in revoking Tirey's probation.

Tirey does not deny on appeal that he violated some conditions of probation, but continues to try to avoid the consequences of his actions by laying blame on others and relying on technicalities. (Appellant's Br. at 13-22.) This is precisely the type of behavior--failure to accept responsibility for his own actions--that the judge determined created a risk to community safety. (Appellant's App. C at 2-3.)

Tirey's homelessness was not an issue for the probation officer or the county attorney, nor did it play any role in the district court's decision to revoke his suspended sentence. Even Tirey did not raise homelessness as one of the many reasons he claimed for missing his appointments. See 3/19/09 Tr. at 33:11 ("I was sick"); 33:16-17 ("I hadn't gotten my medication yet"); 33:21-25 (the job logs); 34:15 ("I run out of gas"); 34:20-21 ("the gas wasn't enough to pick up out of the tank so I had to walk back up and I got some gas again"); 35 ("she never did return my call"); 36:7-8 ("Lindsay [Clodfelter] called me in the middle of my, um, [job] interview"); 36:25-37:1 ("I never got a hold of her"); 37:8-9 ("Lindsay [Clodfelter] had lost her cell phone"); 44 ("the gas gauge doesn't work on the truck"); 47 ("There was no appointment set at that time."); 48 ("There was no appointment on December 2nd"); 52:15-16 ("I didn't even know anything about a late group"); 52:17-18 ("I couldn't 'cause I was at a job interview"); 53 ("that's the only number I had"); 55 ("I thought I had enough [gas]"); 55 ("I never knew where

[Lindsay Clodfelter's office] was at"); 56 ("[the probation officer] did not give me the address, she said that I had to get it from Lindsay [Clodfelter]").

Furthermore, it appears that Tirey did not even ask his probation officer to approve the Upper Woodchuck residence (Appellant's App. D) until December 2, 2008, the day before his arrest, so the probation officer's failure to approve it cannot have been an issue in the revocation. (Def's Ex. B at 12/2/08.) Finally, Appellant's App. E was not part of the record below, because where Tirey was staying at night and how he was keeping warm was not at issue in this revocation proceeding.

The issue below was very clearly Tirey's lack of accountability for his whereabouts during the day, particularly his failure to attend his appointments with his sex offender treatment provider and his probation officer. Although the job logs were designed to help keep the probationer on task, their primary value to the probation officer was as an aid to monitoring the probationer's whereabouts. As the district court stated: "The Court is not concerned about Mr. Tirey either not getting a job or not having 20 employment-related contacts . . . per day." (5/12/09 Tr. at 70.) Rather, the primary concern was Tirey's "failure to accept responsibility." (Id.) The district court did not abuse its discretion in revoking Tirey's probation under the facts of this case.

II. THE DISTRICT COURT DID NOT EXCEED ITS STATUTORY AUTHORITY BY IMPOSING ADDITIONAL CONDITIONS OF PROBATION UPON REVOCATION.

A. Background

The Report of Violation filed by Tirey's probation officer recommended that Tirey's conditions of probation be modified to include the language of 18 proposed conditions that are now commonly imposed upon sex offenders. (D.C. Doc. 100, Report of Violation at 3-4.) At the dispositional hearing, both the probation officer and county attorney recommended that Tirey be sentenced to 25 years in prison. (5/12/09 Tr. at 32-33, 66.) Tirey's attorney recommended re-imposition of the 25-year suspended sentence. (5/12/09 Tr. at 68.) The judge imposed the 25-year sentence to prison, but suspended 7 years of it, imposing the probation officer's recommended conditions on the suspended portion of the sentence. (5/12/09 Tr. at 70-71; 76-77.) The 18 proposed conditions were consolidated into 13 in the final judgment upon revocation. (D.C. Doc. 124 at 3-6.)

The first condition requires Tirey to obtain his probation officer's approval for any employment, and places certain restrictions on his employment to avoid access to children. (D.C. Doc. 124 at 3, Condition 1.) The second through fourth conditions added upon revocation require Tirey to continue sex offender treatment for the entire period of his supervision unless released by his probation officer and therapist, and to follow all treatment rules and recommendations. (D.C. Doc. 124

at 3-4, Conditions 2-4.) Conditions 5 through 8 added restrictions on Tirey's access to children, including residence restrictions. (D.C. Doc. 124 at 4-5, Conditions 5-8.) Conditions 9-13 added restrictions on Tirey's access to sexually oriented materials via television, movies, cell phones, 900 numbers, or the Internet. (D.C. Doc. 124 at 5-6, Conditions 9-13.)

All of these "additional" conditions of probation expound upon conditions that were imposed on Tirey in his original judgment. For example, Tirey's original judgment already stated that he "must obtain gainful employment, and remain so employed, to the satisfaction of his supervising officer;" "may not change his employment without the prior approval of his supervising officer;" and "may not have unsupervised contact with females under the age of 18." (D.C. Doc. 28 at 4-5, Conditions 1(c), 1(d), and 6.)

Tirey's original judgment also stated that he:

> must comply with all recommendations for out-patient sex offender treatment resulting from his treatment in prison. He must also undergo any additional treatment deemed appropriate by his supervising officer. He must follow all resulting treatment recommendations to the satisfaction of his treatment provider and supervising officer.

(D.C. Doc. 28 at 4-5, Condition 2.)

Tirey's original judgment stated that Tirey could not have unsupervised contact with females under the age of 18 and that he was not permitted to "change his place of residence without the prior approval of his supervising officer." (D.C.

Doc. 28 at 4-5, Conditions 1(a) and 6.) It also stated that Tirey "may not possess or view pornography or any other type of sexually oriented material deemed inappropriate by his supervising officer or treatment providers." (D.C. Doc. 28 at 5, Condition 3.)

B. Analysis

1. The 2007 Revocation Statute Applies to Tirey's Revocation Proceeding.

Tirey contends that "[t]he law in effect at the time an offense is committed controls as to . . . revocation of that sentence." (Appellant's Br. at 23.) That general rule is only applicable, however, if the legislature has not expressed a contrary intent. See Johnson v. United States, 529 U.S. 694, 702 (2000).

In Montana, the legislature has clearly stated its intent that the revocation statute in effect at the time of revocation controls, regardless of the date of the initial offense. Subsection (9) of the revocation statute states: "The provisions of this section apply to any offender whose suspended or deferred sentence is subject to revocation regardless of the date of the offender's conviction and regardless of the terms and conditions of the offender's original sentence." Mont. Code Ann. § 46-18-203(9). Subsection (9) was adopted in 2003, effective April 15, 2003, and included the following applicability provision: "[This act] applies retroactively . . . to offenders in the custody of or under the supervision of the department of corrections on [the effective date of this act]." 2003 Mont. Laws, ch. 345, § 3.

Because Tirey was in the custody of the Department of Corrections (serving his initial term of imprisonment in Montana State Prison) on April 15, 2003, subsection (9) and the revocation provisions in effect at the time of his revocation proceeding apply to him.

Tirey relies on State v. Brister, 2002 MT 13, ¶ 26, 308 Mont. 154, 41 P.3d 314 and State v. Rudolph, 2005 MT 41, ¶ 16, 326 Mont. 132, 107 P.3d 496 to support his argument that the 1995 Code applies. But both Rudolph and Brister dealt with revocations that occurred before the legislature adopted the retroactivity provisions in Mont. Code Ann. § 46-18-203(9). Neither of those cases addresses subsection (9) or considers its applicability, so they are of little relevance in Tirey's case.

Furthermore, the legislative history of subsection (9) indicates that it was adopted specifically in order to supersede this Court's opinion in State v. Brister, 2002 MT 13, ¶ 26, 308 Mont. 154, 41 P.3d 314. The proponent of the bill proposing subsection (9), after describing the Brister holding that the revocation statute at the time of the original offense determines what conditions may be imposed upon revocation of a sentence, stated:

> [This bill] makes retroactive the authority to impose new or modified conditions. This will help revocation courts by alleviating the burden of applying old, outmoded laws. Granting courts this authority, regardless of the date and terms of the original sentence, will promote rehabilitation, encourage courts to consider alternatives to

> imprisonment and allow for the creation of new or modified conditions necessary to keep the community safe.

Mont. H. Judiciary Comm., Hearing on H.B. 170, 58th Leg., Reg. Sess., Ex. 3 (Jan. 20, 2003) (emphasis added). In adopting this bill, the legislature made it clear that it intended subsection (9), not the holding of Brister, to control future revocation proceedings.

Under Mont. Code Ann. § 46-18-203(9), Tirey's revocation was controlled by the revocation statute in effect at the time his revocation took place. Because his revocation proceeding was initiated based on acts and omissions in November and December 2008, the 2007 version of the Code applies.

2. All of the Added Conditions "Could Have Been Imposed" at the Time of Tirey's Original Offense.

Montana Code Annotated § 46-18-203(7)(a)(iii) (2007) provides:

> If the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence, the judge may . . . revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence . . . .

Here, the district court did not require Tirey to serve the full "sentence imposed" (25 years in prison), but did require him to serve a "sentence . . . that does not include a longer imprisonment or commitment term than the original sentence" (25 years, with 7 suspended). Furthermore, at the time of Tirey's original offense in 1996, the district court "could have imposed" on the suspended

portions of Tirey's sentence "any . . . reasonable conditions considered necessary for rehabilitation or for the protection of society." Mont. Code Ann. § 46-18-201(1)(a)(xi) and (b) (1995); see also Mont. Code Ann. § 46-18-202(1)(e) (1995).

Tirey does not challenge the relationship of the new conditions imposed on him to the objectives of rehabilitation and the protection of society. They are reasonable conditions considering his history and the offense he committed, and should be affirmed. See State v. Ashby, 2008 MT 83, ¶ 15, 342 Mont. 187, 179 P.3d 1164 (requiring conditions to have "a nexus to either the offense for which the offender is being sentenced, or to the offender himself or herself").

Brister does not dictate a different conclusion. Brister involved the statutory interpretation of an earlier revocation statute that has no bearing on Tirey's case. Under that earlier statute, the district court had only two options upon revocation: "either revoke the suspended sentence and order the defendant to serve the remainder of his prison term, or continue the suspended sentence under the original terms." Brister, ¶ 27. That is no longer the case for Tirey. Mont. Code Ann. § 46-18-203(7)(a)(iii), (9) (2007); see also Mont. Code Ann. § 46-23-1011(4) (allowing a district court to modify conditions of probation at any time upon the request of the probation officer). The post-2003 revocation statute authorized a revoking court to include new or modified conditions of probation that could have

been imposed at the time of the original offense, so long as they did not extend the length of the total sentence.

3. Tirey's Ex Post Facto Argument Is Waived Because He Failed to Raise It Below.

In State v. LaFreniere, 2008 MT 99, ¶ 13, 342 Mont. 309, 180 P.3d 1161, this Court held that an ex post facto claim, as applied to new conditions of probation, must be raised below in order to be preserved for appeal. Cf. also United States v. Marcus, 560 U.S. ___, No. 08-1341 at 5-8 (U.S. May 24, 2010) (holding that an "*Ex Post Facto* Clause violation" does not necessarily constitute plain error).

In Tirey's case, he was on notice from the time of the filing of the Report of Violation that new conditions were being proposed. (D.C. Doc. 100, attached Report of Violation at 3-4.) He did not raise any objection to those proposed conditions until his dispositional hearing, at which time the main objection was that "some of these things are--are already covered" by the original conditions of probation. (5/12/09 Tr. at 72.) Tirey's counsel continued:

> Um, I think the other ones are going to be what's normally required, although I think it's--it's fairly strict. I think if he's accompanied by a responsible adult--I'm not sure--I guess I'd object to No. 9, it's--I mean there's just so many limitations on this that that all has to be approved. . . . But, um, I think everything else would be acceptable.
>
> There may be a problem with No. 11, I mean any movie or TV show may depict human nudity, I don't--that's so commonplace I

> think that--that would be a problem. . . . And the same with 12. And I think that's--that's it.

(5/12/09 Tr. at 72-73 (emphasis added).) The district court responded to these concerns by imposing the new conditions, urging Tirey to clarify any questions with his probation officer, and adding: "That's about the only way that the Court can try to give you an opportunity to be back out in the community which is what I am trying to do by fashioning this sentence." (5/12/09 Tr. at 73.)

Nowhere in this discussion was there any indication that Tirey believed that the imposition of these new conditions violated the ban on ex post facto laws. As the initial reaction of Tirey's attorney indicated, these conditions were of a type "normally required" of convicted sex offenders. Under LaFreniere, Tirey has not preserved an ex post facto claim for appeal, and the issue should not be reached.

4. If the Ex Post Facto Claim Is Reached, It Should Be Denied.

a. Summary of ex post facto argument

The initial consideration in any ex post facto challenge is whether the law being challenged is retroactive. In Montana, the legislature has made it clear, at least since April 2003, that it intends for the revocation statutes to apply to any revocation proceedings that take place after their adoption or amendment, including retroactively to those defendants who committed their offenses before the statutes were adopted or amended.

The next consideration, therefore, is whether those revocation statutes, as applied, increase the punishment for the defendant. The focus in this step is on the actual changes made to the original sentence, not on the statute. New conditions of probation are permissible, so long as their purpose is for rehabilitation or protection of the public, and not punishment.

For Tirey, the controlling revocation statute allowed new conditions of probation to be added upon revocation. And the conditions imposed did not increase his punishment. They simply provided rules to aid in his rehabilitation and the protection of the public. Therefore, there is no ex post facto violation in his case.

b. The 2007 revocation statute operates retroactively.

In order to prevail on an ex post facto claim under Article I, Section 10 of the U.S. Constitution or article II, section 31 of the Montana Constitution, Tirey must show "both that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he acted." Johnson v. United States, 529 U.S. 694, 699 (2000) (citing California Dep't of Corrections v. Morales, 514 U.S. 499, 506-07 n.3 (1995)); see also Wright v. Mahoney, 2003 MT 141, ¶ 7, 316 Mont. 173, 71 P.3d 1195. Tirey has incorrectly conflated the two prongs of this inquiry into one, arguing that "[t]he imposition of a sentence under statutes not in effect at

the time the offense was committed is an unconstitutional ex post facto application of the law." (Appellant's Br. at 23.)

Certainly, the Ex Post Facto Clause creates a presumption that "legislation, especially of the criminal sort, is not to be applied retroactively," but the legislature may overcome that presumption by making a "clear statement of [retroactive] intent." Johnson, 529 U.S. at 701. With respect to Montana's revocation statute, the retroactive intent of the legislature is clear: as of 2003, the revocation statute at the time of the revocation proceeding controls, regardless of the date of the offense. Mont. Code Ann. § 46-18-203(9). The question then becomes whether the *application* of that 2003 legislation violates the Ex Post Facto Clause. Johnson, 529 U.S. at 701.

Although State v. Tracy, 2005 MT 128, ¶ 16, 327 Mont. 220, 113 P.3d 297 includes language that would appear to support Tirey's broad statements about the effect of the Ex Post Facto Clause, a closer examination reveals that this Court found that the 2003 amendments to the revocation statute did apply to Tracy's 2003 revocation proceeding, even though his crime was committed in 1996. Tracy, ¶ 20 ("The 2003 amendments to § 46-18-203, MCA, authorize the District Court's December 16, 2003, sentence.") The Court went on to find, however, that "the application of the 2003 version of § 46-18-203, MCA, to Tracy is an *ex post*

facto application of the law, which cannot stand constitutional muster." Tracy, ¶ 20 (emphasis added).

Earlier revocation cases, such as State v. Rudolph, 2005 MT 41, ¶¶ 7, 16, 326 Mont. 132, 107 P.3d 496, and State v. Brister, 2002 MT 13, ¶¶ 1, 26, 308 Mont. 154, 41 P.3d 314, dealt with revocations that took place before the retroactive 2003 amendments, and therefore correctly held that the revocation statute in effect at the time of the offense was controlling.

State v. Azure, 179 Mont. 281, 282, 587 P.2d 1297, 1298 (1978), was not a revocation case, but, like Tracy, included broad language about the applicability of sentencing statutes without any consideration of legislative intent as to retroactivity. Nevertheless, as with Tracy, the actual holding of the Court was that the new law was "*ex post facto* as applied to that defendant." Id. (emphasis added).

c. The addition of conditions of probation under the 2007 revocation statute did not increase Tirey's punishment or have a punitive effect.

The ex post facto issue in Tirey's case, therefore, is not whether the 2007 revocation statute operates retroactively to him (it clearly does), but whether it "raises the penalty from whatever the law provided when he acted." Johnson, 529 U.S. at 699. The exact wording of the test used in ex post facto cases often varies. In State v. Mount, 2003 MT 275, ¶¶ 16-25, 317 Mont. 481, 78 P.3d 829,

this Court reviewed various formulas used in Montana cases, including whether a retroactive law "inflicts a greater punishment," "disadvantaged the offender," "can be fairly characterized a punishment," or "makes punishment for a crime more burdensome."

The key point of every test, however it is worded, is that a new law may not increase the "punishment" or impose new "punitive" sanctions on an offender. See, e.g., California Dep't of Corrections v. Morales, 514 U.S. 499, 511 n.7 (1995) ("whether a given legislative change has the prohibited effect of . . . increasing punishments"); id. at 506 n.3 ("the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage'"); State v. Griffin, 2007 MT 289, ¶¶ 17-19, 339 Mont. 465, 172 P.3d 1223; State v. Mount, 2003 MT 275, ¶¶ 33, 39-41, 317 Mont. 481, 78 P.3d 829; Wright v. Mahoney, 2003 MT 141, ¶¶ 7, 12-13, 316 Mont. 173, 71 P.3d 1195; State v. Duffy, 2000 MT 186, ¶¶ 29, 31, 300 Mont. 381, 6 P.3d 453; State v. Woods, 285 Mont. 46, 54 n.1, 945 P.2d 918, 923 n.1 (1997); Frazier v. Montana State Dep't of Corrections, 277 Mont. 82, 87, 920 P.2d 93, 96 (1996); State v. Coleman, 185 Mont. 299, 315, 605 P.2d 1000, 1011 (1979).

Relying on many of these cases, the State has frequently argued that the addition of statutorily authorized conditions of probation to the suspended portion of a sentence imposed upon revocation does not violate the Ex Post Facto clause,

so long as the new conditions are not "punitive" and do not increase the "punishment" imposed by the original sentence. See, e.g., State v. Griffin, 2007 MT 289, ¶¶ 17-19, 339 Mont. 465, 172 P.3d 1223 (holding that the addition of a condition requiring participation in the Intensive Supervision Program does not implicate ex post facto concerns).

The State continues to urge that basic approach, particularly since the legislature has demonstrated a clear intent to provide district courts with authority to add new conditions of probation at any time, regardless of the date of the offense. See 2001 Mont. Laws ch. 493, §§ 2, 4, 10 ("An Act . . . Clarifying That the District Court May Add Conditions to or Modify Conditions of Probation; Providing a Procedure for Adding or Modifying Conditions of Probation . . . ," applicable retroactively to offenders under the custody or supervision of the Department of Corrections on May 1, 2001); 2003 Mont. Laws ch. 345, § 3, supra; Mont. Code Ann. §§ 46-18-203(7)(a), (c) and 46-23-1011(4)(a).

An approach that focuses on the question of whether new conditions are "punitive" or "increase the punishment" originally imposed would be in line with recent ex post facto jurisprudence of this Court. In State v. Griffin, 2007 MT 289, ¶ 17, 339 Mont. 465, 172 P.3d 1223, this Court said:

> Not every modification of the conditions of a suspended sentence will implicate *ex post facto* concerns. The touchstone of the *ex post facto* analysis in this context is whether an offender's sentence has been changed in a punitive sense. State v. Mount, 2003 MT 275,

> ¶ 89, 317 Mont. 481, 78 P.3d 829 (adopting the intents-effects test to determine whether laws are punitive or non-punitive). The modification of an offender's conditions of probation must be distinguished from a modification of an offender's sentence itself.

See also State v. Anderson, 2008 MT 116, ¶ 33, 342 Mont. 485, 182 P.3d 80 ("[s]imply because a statute operates on events antecedent to its effective date does not make the statute ex post facto").

Thus, most of the applications of retroactive criminal laws in Montana that have been struck down on ex post facto grounds have met the "increase in punishment" or "punitive effect" standard, even when that standard was not cited. See, e.g., State v. Striplin, 2009 MT 76, ¶ 32, 349 Mont. 466, 204 P.3d 687 (adding a condition requiring the defendant to spend 30 days in jail); State v. Tracy, 2005 MT 128, 327 Mont. 220, 113 P.3d 297 (converting a sentence from a Department of Corrections commitment to incarceration at Montana State Prison); State v. Azure, 179 Mont. 281, 282, 587 P.2d 1297, 1298 (1978) (eliminating or delaying a defendant's parole eligibility).

Under the guidelines of these cases, the additional conditions of Tirey's suspended sentence did not result in any "increase in punishment" because they were not intended to punish, but rather to protect the public and to aid in his rehabilitation by preventing his exposure to circumstances that could trigger another offense. As the U.S. Supreme Court has said, "an imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive

governmental objective and has been historically so regarded.'" Smith v. Doe, 538 U.S. 84, 93 (2003) (citing Kansas v. Hendricks, 521 U.S. 346, 363 (1997)). Furthermore, the fact that Tirey's conditions of probation were "consistent with the purposes of the [State's] criminal justice system" and that the criminal process could be invoked in aid of those conditions does not render them "punitive." See Smith v. Doe, 538 U.S. at 93-96.

Tirey's new sentence was authorized by Mont. Code Ann. § 46-18-203(7)(a)(iii) (2007). His original sentence was not lengthened nor changed "in a punitive sense." Therefore, Mont. Code Ann. § 46-18-203(7)(a)(iii) (2007) was not an ex post facto law as applied to him.

d. The district court's authority in resentencing after revocation is limited by the length of the original sentence, but not by conditions of probation.

Tirey relies on State v. Frazier, 2001 MT 210, ¶ 15, 306 Mont. 358, 34 P.3d 96, and State v. Gordon, 1999 MT 169, ¶ 45, 295 Mont. 183, 983 P.2d 377, for the proposition that: "The district court's authority in resentencing after revocation is limited by the parameters set forth by the original sentence, and can impose no additional restrictions." (Appellant's Br. at 27 (emphasis added).)

Neither Frazier nor Gordon stands for the proposition that no additional conditions of probation may be added in resentencing after revocation. In State v. Frazier, the narrow question was whether a revoking court could "retain

jurisdiction" over the defendant by recommending participation in boot camp as a condition for reimposing a probationary sentence. The Court found no problem in allowing a revoking court to retain such jurisdiction, noting that the revoking court's authority "encompasses the power to reimpose the original sentence via a combination of imprisonment and suspension, both totaling no greater than the length of the original sentence." Frazier, ¶ 15 (emphasis added).

In fact, the Frazier Court affirmed the district court's authority "to alter the terms and conditions of Frazier's original sentences," Frazier, ¶ 19. The district court's order, which this Court affirmed, specifically stated that if a new probationary sentence were imposed, it would be "subject to conditions to be determined" at that time. Frazier, ¶ 16. It is clear in the context of the case, therefore, that Frazier's bar on "additional restrictions" does not refer to new conditions of probation.[1]

The State v. Frazier Court cites State v. Gordon as support for its language, but Gordon had nothing to do with revocations and certainly never held that a new sentence upon revocation could impose "no additional restrictions" on a defendant. The actual language in Gordon was this: "A sentence is legal if it falls within the

[1] The reference to "no additional restrictions" may refer to restrictions on parole eligibility. See State v. Richardson, 2000 MT 72, ¶¶ 26-27, 299 Mont. 102, 997 P.2d 786; State v. Lindeman, 285 Mont. 292, 309, 948 P.2d 221, 232 (1997); State v. Finley, 276 Mont. 126, 148, 915 P.2d 208, 222 (1996), overruled in part on other grounds, State v. Gallagher, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P. 3d 817.

range of sentences prescribed by the applicable statute or statutes." Gordon, ¶ 45 (citation omitted). The State has no quarrel with that language in Gordon, nor with what it considers to be the real holding of Frazier, which is that "[t]he district court's authority in resentencing after revocation is limited by the parameters set forth by the original sentence" insofar as the total *length* of imprisonment and suspension imposed upon revocation may not be greater than the *length* of the original sentence. Frazier, ¶ 15; cf. Griffin, ¶ 18 ("If, for example, a district court added months or years to a defendant's sentence under the color of [statutory authority allowing the addition of conditions of probation], that would clearly violate the constitutional prohibition against *ex post facto* laws.").

Tirey's sentence imposed upon revocation--25 years in prison, with 7 suspended--did not exceed in length his original sentence--25 years in prison. It complies with the limitations of State v. Frazier.

5. A Sentence of 25 Years, With 7 Years Suspended Upon New Conditions, Is a "Lesser Sentence" Than a Sentence of 25 Years Imprisonment.

Assuming arguendo that the revocation statutes of 1995 were applicable to Tirey, they would authorize the addition of new conditions of probation. Mont. Code Ann. § 46-18-203(7)(c) (1995) authorized a revoking court to "revoke the suspension of sentence and require the defendant to serve either the sentence imposed or any lesser sentence." In Tirey's case, the "sentence imposed" was

25 years in the Montana State Prison. (D.C. Doc. 28 at 3.) The revoking court had the authority to impose any sentence "less" than 25 years in prison. Here, the court imposed 25 years in prison, with 7 years suspended on certain conditions. This is, on its face, a "lesser sentence" than 25 years in prison.

The cases of State v. White, 2008 MT 464, ¶¶ 23-24, 348 Mont. 196, 199 P.3d 274, and State v. Rudolph, 2005 MT 41, ¶ 17, 326 Mont. 132, 107 P.3d 496 would seem to require the opposite result. But the State contends that White and Rudolph should be overruled because they wrongly assumed that "the sentence imposed" was the suspended sentence, not the sentence of imprisonment (which was then suspended). In White, for example, the Court compared a 10-year suspended sentence with conditions A, B, and C to a 10-year suspended sentence with conditions A, B, C, D, E, and F, and found that the latter was not a "lesser" sentence than the former. White, ¶ 23. This reading of the 1995 revocation statute, if followed to its logical conclusion, would prevent a revocation court from ever requiring a revoked probationer to go to prison, since any term of incarceration would obviously be a "greater" sentence than another period of probation. That is clearly not the correct reading.[2]

[2] Neither Rudolph nor White addressed the 2003 amendments to the revocation statute. The revocation in Rudolph took place before those amendments became effective, and the Court's analysis in White addressed a 1997 revocation, not the later 2007 revocation. Rudolph, ¶ 7; White, ¶¶ 19-24.

The "sentence imposed" is the sentence of incarceration, and the revocation statute authorizes the district court to require the defendant to serve that sentence in prison, or any "combination of imprisonment and suspension, both totaling no greater than the length of the original sentence." State v. Frazier, ¶ 15 (citing State v. Docken, 274 Mont. 296, 302, 908 P.2d 213, 216 (1995) and Speldrich v. McCormick, 243 Mont. 238, 240, 794 P.2d 339, 340 (1990)); see also State v. Roberts, 2010 MT 110, ¶ 14, 356 Mont. 290, ___ P.3d ___ (holding that the "sentence imposed" was a 15-year commitment to the Department of Corrections, with no time suspended).

Again looking to the 1995 statutes, when imposing the new suspended sentence, the district court was authorized to "impose on the defendant any reasonable restrictions or conditions during the period of suspended sentence," (Mont. Code Ann. § 46-18-201(1)(b) (1995)) including "any . . . reasonable conditions considered necessary for rehabilitation or for the protection of society." Mont. Code Ann. § 46-18-201(1)(a)(xi) (1995). Tirey's 25 year sentence, with 7 suspended on conditions considered necessary for rehabilitation and for the protection of society, was a "lesser sentence" than 25 years in prison, and therefore was authorized by the revocation statutes in effect at the time he committed his offense. If that is the case, there is no need to pursue any ex post facto analysis. See Johnson, 529 U.S. at 702-03 ("the *ex post facto* question does not arise").

III. THE STATE CONCEDES THAT THE DISTRICT COURT ERRED BY CHANGING TIREY'S DESIGNATION LEVEL AS A SEX OFFENDER WITHOUT ORDERING A NEW SEX OFFENDER EVALUATION.

The State concedes that under the circumstances of this case, the district court erred in re-designating Tirey from a Level One sex offender to a Level Two sex offender without ordering a current evaluation report by a qualified sex offender evaluator as required by Mont. Code Ann. § 46-23-509(2). See 5/12/09 Tr. at 35 (Tirey was classified as a Level One sex offender when discharged from prison).

IV. THE DISTRICT COURT PROVIDED SUFFICIENT REASONS FOR ITS DETERMINATION THAT NO CREDIT BE GIVEN FOR TIME ELAPSED WHILE ON PROBATION.

The hearing transcript together with the court's oral and written statements provides the statutorily required statement of reasons for the court's determination to deny credit for street time. Mont. Code Ann. § 46-18-203(7)(b); cf. State v. Baird, 2006 MT 266, ¶¶ 30-31, 334 Mont. 185, 145 P.3d 995 (requirement for a written statement of reasons satisfied when the oral and written records, read as a whole, provide an adequate basis for appellate review); State v. Richardson, 2000 MT 72, ¶ 15, 299 Mont. 102, 997 P.2d 786 (oral findings and written order provide the necessary statement of reasons); see also State v. Senn, 2003 MT 52, ¶¶ 27-29, 314 Mont. 348, 66 P.3d 288 ("failure to comply" with conditions of

suspended sentence, together with reasons for overall judgment, held to be sufficient statement of reasons for denying credit for street time); State v. Hardy, 278 Mont. 516, 524, 926 P.2d 700, 705 (1996) (reasons for sentence held to include reasons for denial of credit for street time).

In this case, the court's order specifically acknowledged as reasons for its order: (1) the nature of the violations of probation conditions, particularly Tirey's failure to participate in sex offender treatment as recommended; (2) Tirey's failure to take responsibility for not attending treatment as directed; and (3) the "incredible excuses" that Tirey offers for his missed treatment appointments. (Appellant's App. C at 2-3.) These statements, read together with the transcript of the hearing (5/12/09 Tr. at 70), provide a sufficient rationale for the denial of credit for street time.

CONCLUSION

The State respectfully requests that this Court affirm the revocation of Tirey's suspended sentence, as well as the sentence imposed by the district court after revocation.

The State concedes that the district court's designation of Tirey as a Level II sex offender should be stricken.

Respectfully submitted this 14th day of June, 2010.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
SHERI K. SPRIGG
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Ms. Eileen A. Larkin
Assistant Appellate Defender
139 North Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

(Hand-delivered into the wire basket located in the reception area in the Attorney General's Office, 215North Sanders, Helena, Montana 59620.)

Mr. Ed Corrigan
Flathead County Attorney
Justice Center
P.O. Box 1516
Kalispell, MT 59903-1516

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,911 words, excluding certificate of service and certificate of compliance.

_____

SHERI K. SPRIGG